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Supreme Court

of the

United States

October Term, [redacted] 1969

No. [redacted] 187

A & S TROPICAL, INC.,

Petitioner,

vs.

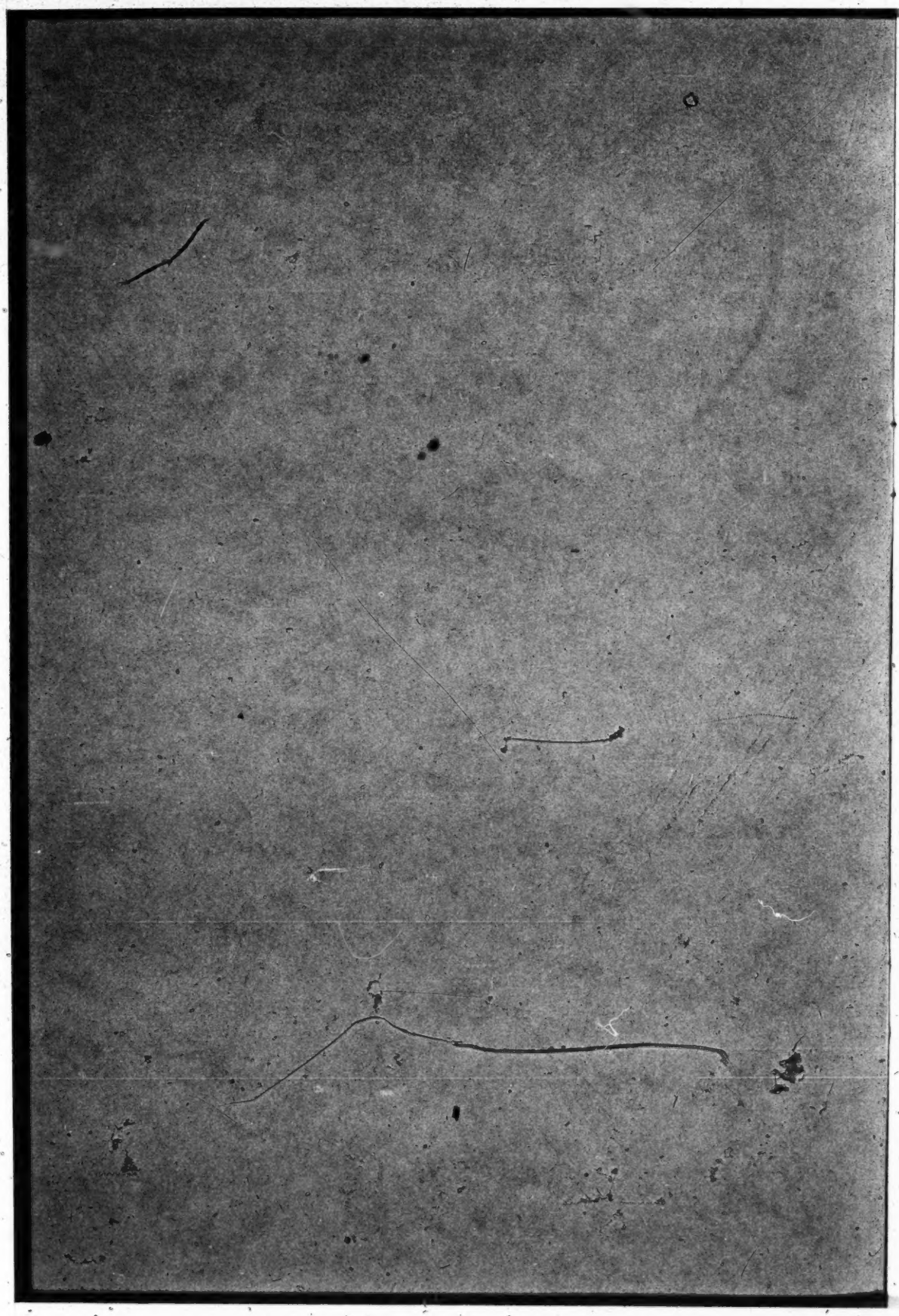
HIRAM WALKER, INCORPORATED, and SOUTH FLORIDA LIQUOR DISTRIBUTORS, INC.,

Respondents.

BRIEF OF RESPONDENT, SOUTH FLORIDA LIQUOR DISTRIBUTORS, INC., IN OPPOSITION TO WRIT OF CERTIORARI

GEORGE H. SALLEY and
PAUL D. BARNS, JR.,
Attorneys for Respondent,
SOUTH FLORIDA LIQUOR
DISTRIBUTORS, INC.
Suite 700 - 100 Biscayne Tower
Miami, Florida 33132

MIAMI REVIEW — 371-4853 — 377-3721



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QUESTION PRESENTED

AS REGARDS THIS RESPONDENT (HEREINAFTER REFERRED TO AS SOUTH FLORIDA) THE QUESTION RAISED BY THE DECISION OF THE COURT OF APPEALS IS:

WHETHER SECTION 2(a) OF THE ROBINSON-PATMAN ACT SHALL BE REWORDED BY THIS COURT SO THAT RETAIL STORE CAN MAINTAIN AN ACTION AGAINST A WHOLESALER WHO MAKES NO SALES IN COMMERCE. (i.e., MAKES NO SALES ACROSS STATE LINES).

COUNTERSTATEMENT OF THE CASE AND COUNTERSTATEMENT OF FACTS

The counterstatement of the case by respondent, HIRAM WALKER, and their counterstatement of facts are adopted by this respondent.

Specifically, as to the petitioner's statement (of fact) that "Free merchandise came to him from Hiram Walker's missionary man who carried it in his car.", the opinion of the Fifth Circuit Court of Appeals held: "Hiram Walker does not sell directly to retail stores, . . . Hiram Walker's activities are limited to promotional work by 'missionary' men who provide retailers with advertising materials and generally act to supplement a national advertising effort designed to promote Hiram Walker products. These 'missionary' men are not salesmen, and do not take orders for liquor."

Furthermore, the record expressly shows Pross' testimony as follows:

> "Q Have you ever received any free liquor or any liquor from a representative of or employee of Hiram Walker?
> "A No." (R. 149)

South Florida grants independently determined and administered quantity discounts to its customers. (R. 280) (R. 289) These discounts are available to all South Florida customers. (R. 287) South Florida has not granted discounts or "consummated deals" with any retailer during the period covered in the Complaint which were not precisely as set forth in its published price lists.

There is no suggestion whatsoever that South Florida made any sale in commerce. The Complaint of Petitioner alleged that all of this respondent's sales were made in Southern Florida.

After the Trial Court denied respondents' Motion for Summary Judgment, the respondents Hiram Walker and South Florida together with the petitioner moved that the trial court certify the appeal to the Court of Appeals, the petitioner concurring that the record clearly showed the facts so that the decision of the appeal court could be "determinative" (R. 592, 594, 602).

Thereafter the Fifth Circuit Court of Appeals found no sale by respondent South Florida in commerce and held that the Robinson-Patman Act is clear. "That is . . . 'at least one of the two transactions which, when compared, generates a discrimination must cross a state line.' Rowe, Supra at 79." (Petition, App. 8)

REASONS FOR DENYING THE WRIT

The writ must be denied as it does not even suggest that the Court of Appeals' decision is in conflict with any decision of this Court or with any decision of any other Court of Appeals. The petitioner merely wishes this Court to amend the Robinson-Patman Act. In passing the Robinson-Patman Act, Congress had no wish to impose upon a local business, not a conspirator, not a monopoly, the statutory prohibitions of the Robinson-Patman Act.

The words of Congress and the intent of Congress have been repeatedly upheld by this Court:

> "The (Robinson-Patman) Act does not prohibit all quantity discounts but expressly permits them under certain conditions. It indicates, too, that the Federal Trade Commission is the appropriate tribunal to hear in the first instance the complicated issues growing out of grievances against a quantity discount practice of a seller. 49 Stat. 1526, 15 U.S.C. §13 (a), 15 U.S.C.A. §13 (a). Quantity discounts are among the oldest, most widely employed and best known of discount practices.
>
> "Moreover, no single sale can violate the Robinson-Patman Act. At least two transactions must take place in order to constitute a discrimination.

". . . these characteristics show that the entire basis for judging under the two Acts is different and that the case law as to the Sherman Act does not fit the Robinson-Patman Act." *Bruce's Juices v. American Can Co.*, 67 S.Ct. 1015 (1016, 1021)

"In order for the sales here involved to come under the Clayton Act, as amended by the Robinson-Patman Act, *they must have been made in interstate commerce.*" *Standard Oil Co. v. FTC*, 340 U.S. at 236-37 (Emphasis Supplied)

There is no basis whatsoever for the Petitioner's statement that the alleged acts were "formerly thought to have been prohibited by the Robinson-Patman Act." The true intent of that law is that it shall not apply to a local wholesaler such as respondent, South Florida.

The reason for the distinction between the Sherman Act jurisdiction and that of the Clayton Act as amended by Section 2-A of the Robinson-Patman Act is clear. A conspiracy for the purpose of restraining trade, increasing prices or fleecing the public is a wrong of one kind.

The prohibitions of the Robinson-Patman Act, more specifically the prohibition complained of by the plaintiff, quantity discounts, never considered malicious, was enacted because of nationwide giants such as the A & P obtaining merchandise on a nationwide basis at prices less than their competition. South Florida, a small local distributor, sets its own prices. (R. 275) There are no

nationwide implications to its business and no implications of its quantity discounts that cross a state line in any manner. South Florida is a small distributor of the same class as the many wholesalers and retailers that have repeatedly been held not to be subject to the Robinson-Patman Act, such as Colonial Oil Company in Orlando, *Abramson v. Colonial Oil Co.*, 390 F.2d 873 (Fifth Circuit 1968), and certainly a much smaller and more local concern than were the defendants in those cases where the Robinson-Patman Act was repeatedly held to refer only to people who made sales in interstate commerce.

Respectfully submitted,

GEORGE H. SALLEY and
PAUL D. BARNS, JR.,
Attorneys for Respondent,
SOUTH FLORIDA LIQUOR
DISTRIBUTORS, INC.,
Suite 700 - 100 Biscayne Tower
Miami, Florida 33132

By _____
Paul D. Barns, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent, SOUTH FLORIDA LIQUOR DISTRIBUTORS, INC., was mailed to ANTONIO MARTINEZ, JR., 10th Floor, First National Bank Building, Miami, Florida 33131; JAMES C. McKAY and GEORGE V. ALLEN, JR., 701 Union Trust Building, Washington, D. C. 20005; WARD, WARD, STRAESSLEY, HISS & KLUTTZ, 1240 duPont Building, Miami, Florida 33131, and MILTON E. GRUSMARK and NATALIE BASKIN, 1674 Meridian Avenue, Miami Beach, Florida 33139, this _____ day of June, 1969.

Paul D. Barns, Jr.